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No. 99-681

Supreme Court, U.S.
FILED
DEC 23 1999

In the Supreme Court of the United States

BARRY ACKERLEY, WILLIAM ACKERLEY, FULL HOUSE SPORTS & ENTERTAINMENT, INC., AND SEATTLE SUPERSONICS, INC., PETITIONERS,

v.

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING, PAT COOKE, LETITIA SELK, AND CHUCK VILTZ, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the scope of Section 15(a)(3) is an important and recurring question of federal law. See Pet. 13-20; Chamber Am. Br. 2-7. Their sole ground of opposition on that issue is a strained contention that there is no circuit conflict, even though the conflict has been recognized by numerous courts and the EEOC. Respondents' argument relies on an artificial narrowing of the rulings of the Second Circuit and of the Ninth Circuit in this case and supplies no basis for denying review.

In a brief rife with distortions and phantom record cites, respondents baldly assert (Opp. 1) that it "cannot reasonably be disputed" that "the employees in this case filed a complaint and instituted proceedings under the Act." Disputed it was, however. The panel (Brunetti, Rymer and Kleinfeld, JJ.) not only found otherwise (see Pet. App. 44a-48a), but did so by "adopt[ing] the Second Circuit's analysis" in *Genesee Hospital* — the very decision that respondents now claim does not conflict with the en banc court's rejection of the panel decision.

Respondents' own actions belie their position here. Knowing full well that the common-sense meanings of "filed any complaint" and "instituted any proceeding" do not support a finding of protected conduct on their facts, respondents convinced the trial court to instruct not in terms of the statutory language itself, but in a manner carefully tailored to the outer contours of respondents' evidence:

> An employee has participated in protected activity if the employee has either complained ***to superiors*** regarding any issues related to the [FLSA] or ***requested information*** from the government about minimum wages or overtime compensation. [ER 360; emphasis added]

That is what the Ninth Circuit held subject to statutory protection and what the Second Circuit unambiguously said is ***not*** protected.

Respondents also mischaracterize the fundamental legal and procedural issues presented by the second and third questions as mere matters of evidentiary sufficiency. More broadly troubling, however, is their effort — exploiting the limitations on a reply in support of certiorari — to make the case appear "uncertworthy" by swamping the Court with factual assertions that are impossible to sustain on the basis of the record and that often do not even claim

record support. That cynical strategy should not be rewarded. There are no factual impediments to further review by this Court, which is warranted to settle the entrenched conflict on the scope of Section 15(a)(3), to reattach the FLSA to its legal moorings, and to confine the Ninth Circuit to its proper role in interpreting legislation.

1. a. Implicitly conceding that the issue of the scope of Section 15(a)(3) is important and recurring, respondents rely primarily on the contention that this case does not reflect a circuit conflict. See Opp. 9-17. But their argument distorts both the decision below and the Second Circuit's ruling in *Genesee Hospital* by relying upon factual differences that were plainly of no moment to the respective courts' formulations of conflicting rules.

Thus, respondents paint the Ninth Circuit's holding as narrowly dependent on Lambert's telephone calls to the Department of Labor and on her placing her overtime concerns in writing. Similarly, they portray *Genesee Hospital* as limited to situations involving only oral complaints. See Opp. 10-11. But these depictions contrast sharply with what the two courts said they were deciding. The Ninth Circuit announced that it would "resolve whether the anti-retaliation provision of [the FLSA] protects employees who complain to their employers about wage and hour violations," and it expressly "***h[e]ld*** that complaints made to employers are within the ambit of the FLSA's anti-retaliation clause." Pet. App. 2a (emphasis added). See also *id.* at 9a, 17a. The Second Circuit reached exactly the opposite conclusion, holding that "[t]he plain language of [the FLSA] * * * does not encompass complaints made to a supervisor." *Genesee Hospital*, 10 F.3d at 55.

Respondents assert (Opp. 10) that "[i]t remains to be seen whether the Ninth Circuit would hold an oral complaint that did not assert coverage under the statute to be protected activity." But there is nothing to wait for. The Ninth Circuit held in no uncertain terms that "the employee may communicate such allegations orally * * * and need not refer to the statute by name." Pet. App. 17a.[1] In any event, the issue that divides the courts, and

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[1] Respondents assert (Opp. 2) that "[n]either the Ninth Circuit nor any other federal court of appeals has held that employees like those in

that is dispositive here, is not the method of complaining but the recipient of the complaint — the government or the employer.

Respondents try to obscure the conflict by contending (Opp. 13) that Lambert "filed a complaint" with the Department of Labor by requesting information over the phone — a theory not encompassed in the jury instructions (see ER 360) and not considered by the Ninth Circuit. See also pp. 5-6, *infra*. Moreover, even if an informal oral communication to the government had been the basis for the judgment, respondents are flatly wrong in asserting (Opp. 13) that "every Circuit addressing the issue has held that informal complaints to and requests for information from the government constitute protected activities under § 215(a)(3)." ***None*** of the cited cases concerns mere "requests for information." *Romeo*, *White & Son*, and *Love* concern only informal complaints to the employer, for which the conflict is patent; *Casey Truck*, *Richardson*, and *Maxey's* involve participation in the process or obtaining the benefits of formal enforcement proceedings.

Respondents are alone in denying the conflict. The en banc court below described the Second Circuit rule to be that "the FLSA does not protect employees who complain internally to their employers" (Pet. App. 11a) but pointedly "join[ed] six ***other*** circuits" to "hold that complaints made to employers are within the ambit of the FLSA's anti-retaliation clause." *Id.* at 2a (emphasis added). The original panel in this case likewise "recognize[d] that several other circuits have come to the conclusion that informal complaints and requests for information from the DOL do constitute protected activities" but "reject[ed] this approach" (*id.* at 47a, 48a) and instead "adopt[ed] the Second Circuit's analysis" (Pet. App. 45a). See also *Knickerbocker* v. *City of Stockton*, 81 F.3d 907, 912 n.3 (9th Cir. 1996) (acknowledging conflict). And the Second Circuit adverted in *Genesee Hospital* to the "contrary" decisions of "a number of our sister circuits." 10 F.3d at 55.

Genesee Hospital, who merely complained that their wages were 'unfair,' are protected by § 215(a)(3)." In fact, the Ninth Circuit explicitly relied on a case resting liability on an employee's comment that she "believed the employer was 'breaking some sort of law.'" Pet. App. 17a (quoting *EEOC* v. *Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir. 1992)).

Recognition of this ripe conflict is widespread. For example, the First Circuit recently noted that "courts of appeals grappling with this issue have differed." *Valerio* v. *Putnam Associates Inc.*, 173 F.3d 35, 41 (1st Cir. 1999). District courts too have stated that the "Courts of Appeals have split on the issue." *Ball* v. *Memphis Bar-B-Q Co.*, 34 F. Supp.2d 342, 345 (E.D. Va. 1999); see also *O'Neill* v. *Allendale Mutual Ins. Co.*, 956 F. Supp. 661, 664-665 (E.D. Va. 1997). Even the EEOC has acknowledged the conflict. See, *e.g.*, EEOC C.A. Br. 4 (arguing that "only the Second Circuit has read section 15(a)(3)" in a manner that would deprive respondents of a cause of action); see also U.S. EEOC, *Compliance Manual*, Section 8-II (B)(1), at 8-3 n.12 (1998).

In light of the conflict among the circuits and the undisputed importance of the issue, further review is warranted.

b. Respondents make the remarkable claim that the ruling in their favor involves nothing more than a "routine application of unambiguous statutory language." Opp. 1. They even go so far as to assert that any construction of Section 15(a)(3) adverse to them would constitute a "[j]udicial [r]epeal of the [s]tatute." Opp. 16. It is ironic indeed to see such assertions proffered by parties who convinced the trial court to define the protected conduct for the jury as "complain[ing] to ***superiors*** * * * or ***request[ing] information*** from the government" (ER 360; emphasis added) — words that are found nowhere in the statute. Indeed, even Judge Reinhardt's opinion for the en banc court found the language of Section 15(a)(3) "possibly subject to differing interpretations." Pet. App. 9a. And the First Circuit, though concluding that the purposes of the statute warranted enlargement of its terms, characterized the issue of statutory construction as "indeed a close question." *Valerio*, 173 F.3d at 41. Significantly, the courts that originated the construction of Section 15(a)(3) adopted by the Ninth Circuit did not even pretend that their interpretations were grounded in the terms of that law. For instance, the Third Circuit, in language echoed in part by the court below (Pet. App. 8a, quoting *Valerio*), stated that it and other "courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language." *Brock* v. *Richardson*, 812 F.2d 121, 124 (3d Cir. 1987). See also Pet. 12.

Respondents seek (Opp. 14-15) to bolster their interpretation by dissecting into unrecognizable pieces the "familiar legal expressions" (*Bradley* v. *United States*, 410 U.S. 605, 609 (1973)) that the statute uses. In so doing, they make not the least effort to explain how that approach could accord with this Court's precedents. See Pet. 15-16. Respondents cannot dispute that the familiar legal sense of "filing a complaint" is formally to place such a document with the clerk of a court or with an agency. Indeed, that usage is ***so*** familiar that respondents employ it themselves when they concede that their own draft "***complaint was not filed*** with the court." Opp. 4 (emphasis added).

Neither *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), nor *Drollinger* v. *Arizona*, 962 F.2d 956 (9th Cir. 1992), supports the decision below. *Mitchell* had nothing to do with complaints to employers; rather, it hinged on the proposition that Section 215(a)(3) is intended to make "employees ***fe[el] free to approach officials*** with their grievances." 361 U.S. at 290 (emphasis added). And *Drollinger* affirmatively refutes their position. The case was decided not under Section 15(a)(3), but under the long-lapsed 1985 amendments that ***broadened*** FLSA anti-retaliation protections ***temporarily*** for certain public employees. See Pet. 19-20. Thus, while the decision below is consistent with the language of the expired temporary provision, that fact simply confirms its departure from the quite different terms of Section 15(a)(3).[2]

c. In their most imaginative gambit, respondents — who elsewhere claim (see Opp. 16) that employees cannot possibly initiate an enforcement proceeding at the Department of Labor —

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[2] Respondents erroneously assert that "Washington law provides that a lawsuit in Superior Court is commenced by serving the complaint on the defendant." Opp. 15. In fact, Washington procedure requires service of a summons "together with" the complaint (Wash. R. Super. Ct. Civ. R. 3), which did not happen here. Moreover, the Washington Rules confirm that serving and filing of a complaint are distinct concepts: "a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided by rule 4, ***or by filing a complaint.***" *Ibid.* (emphasis added). In any event, the issue here is not the effect of respondents' actions under Washington law but whether they "filed any complaint" within the meaning of Section 215(a)(3).

say that Lambert's two phone calls requesting information from the Department "initiat[ed] enforcement actions by the Department of Labor" (Opp. 15). This absurd contention was neither made by respondents below nor relied on by the Ninth Circuit, which described the issue before it as "whether the anti-retaliation provision of [the FLSA] protects employees who complain to their employers about wage and hour violations." Pet. App. 2a.

Indeed, the jury was never asked to find whether Lambert had "instituted any proceeding * * * under or related to" the FLSA, but only whether she "requested information from the government" (ER 360). That respondents knew that their evidence established nothing more is apparent from review of the testimony on which respondents' newly minted theory relies. See App., *infra*, 1a-3a. All the Labor Department official did was to "walk[] through the overtime compensat[i]on structure" over the telephone, "point[ing] out those things which were against the law" (*id.* at 1a), and then mail "documentation" on which "he had marked everything that was pertinent." *Id.* at 2a-3a. That is the sum of the evidence that respondents advance for their claim that they "instituted any proceeding * * * under or related to" the FLSA.

2. Respondents try to obscure the Ninth Circuit's remarkable legal judgment that corporate officers are personally liable for their subordinates' retaliatory acts, but they cannot make the issue go away. The jury in this case was charged that any "corporate officer or director with significant control of * * * a corporation" that employed respondents was "liable if you find in favor of the plaintiffs on their FLSA claims." ER 361-362. Although this instruction required no proof of a personal violation of the FLSA by either individual defendant, the Ninth Circuit adopted this unjust and untenable standard as "entirely consistent with our interpretation of 'employer' under the FLSA, and * * * in no way erroneous." Pet. App. 25a.

Respondents unwittingly acknowledge the need for further review when they state that "[t]he FLSA grants an employee a private right of action against a person ***who has engaged in retaliation*** if that person is an 'employer.'" Opp. 18 (emphasis added). That is precisely the point. The fatal flaw in the instruction given in this case is that it does ***not*** require the jury to find that the employer himself "engaged in retaliation." Rather, it

directs a verdict against any manager with ultimate "control" so long as ***any*** employee has violated the FLSA.

Respondents erroneously assert (Opp. 19) that the courts are not in conflict over the standards for individual liability under the FLSA. In fact, as the Chamber of Commerce has laid out (Br. 13-15), the courts have employed various, disparate standards. See also Pet. 21 n.7. Respondents also observe (Opp. 18) that no manager has been relieved of liability as a matter of law on similar facts, but that is not surprising: no other plaintiff appears to have sought individual liability under such circumstances. Respondents fail to identify a single case in which senior executives of a solvent, publicly traded company have been subjected to compensatory liability under the FLSA, let alone to millions in punitive damages.[3] Nor has personal liability ever rested solely on a finding that the individuals had the authority to control their subordinates, without regard to personal involvement in wrongdoing.

b. Rather than defend the legal standard for personal liability used at trial and upheld on appeal, respondents mischaracterize the question presented as involving a challenge to the sufficiency of the evidence of the Ackerleys' status as "employers." They then try to improve upon the flimsy evidence cited by the Ninth Circuit as sufficient to support individual (and punitive) liability (see Pet. 22-24 & nn. 8-9) by asserting numerous purported facts (Opp. 20-22) to show that Barry Ackerley and William Ackerley could be found personally complicit in the alleged retaliation against respondents. (Even if valid, that showing is irrelevant here, because the jury was never required to determine whether the individual defendants personally committed, authorized, or even knew of the alleged violation.)

Regrettably, many of respondents' assertions are fabricated from whole cloth or liberally embroidered; those that have some foundation in the record say nothing about ***retaliation***, but rather show only that the Sonics' top managers reported to Barry

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[3] Respondents' claim (Br. 20) that "the Ackerleys' corporation" was "closely held" is flatly wrong. As respondents know full well, having themselves put the company's Form 10-K into evidence, the corporation's stock has been publicly traded for years. See Pet. App. 74a n.16.

Ackerley and William Ackerley, and that the former was aware of Lambert's overtime dispute while the latter knew of the planned discharge of the ticket sales employees (but not, so far as the evidence shows, of any improper motive for the action).

Because of space limitations, a few examples typifying respondents' misleading assertions will have to suffice. Respondents state (Opp. 21) that Eric Rubin, general counsel for Ackerley Communications, "was intimately involved in the unlawful plan." The cited testimony (and the rest of the record) contains nothing about a plan, but says only: "I called our corporate counsel * * * [a]nd I perhaps assumed that our corporate counsel was going to tell Barry if he felt the need to." App., *infra*, 4a. Likewise, there was no evidence that Dresel's June 22, 1994 note that "Barry [was] being told" had ***anything*** to do with a so-called "retaliation strategy" (Opp. 21). See App., *infra*, 8a. Rather, that notation referred to the June 17 letter from Lambert's attorneys. See *id.* at 4a; ER 117-118. Respondents seem to believe — and the Ninth Circuit apparently accepted — that any evidence that either Barry Ackerley or William Ackerley was told about any overtime issue proves their personal involvement in ***retaliation*** against respondents. That is preposterous.

Respondents also assert (Opp. 21) that a "memorandum from Mr. Dresel inform[ed William] Ackerley of the retaliatory firings." Again, the word "retaliatory" is pure invention. The memorandum (App., *infra*, 7a) noted that "the ticketing staff's hours" had been reduced the previous November for lack of work, that in the current winter Dresel expected "insufficient work to keep these employees busy," and that he had concluded "that these positions are more seasonal in nature." Dresel announced that he was "therefore planning to layoff the entire ticketing sales staff by November 30." *Ibid.* Of retaliation or overtime there is not a word. Yet respondents insist that this is evidence that William Ackerley violated the FLSA.

Finally, the supposed "evidence" that "Barry Ackerley was personally involved in employee terminations and actively participated in other issues relating to ticket sales" (Opp. 22) had nothing to do with the fate of the ticket sales clerks. Rather, the evidence showed only that Dresel "talked to" Barry Ackerley about basketball "ticket ***prices***" and discussed the situation of a

radio personality who had, in order to gain release from a contract, been "verbally abusing" members of the Sonics organization over the airwaves. App., *infra*, 5a-6a.[4]

3. Respondents do not attempt to deny that the Ninth Circuit made itself the fact-finder on an essential element of liability by finding that each respondent engaged in protected conduct because Lambert "complained" in a representative capacity. Whether that was so was disputed at trial but never presented to the jury, which was not required to find that more than one plaintiff had complained in any way. See Pet. 25-26. Instead, respondents rely on a misapplication of concepts of harmless error.

While a failure to instruct a jury on an element of liability may be harmless if the jury's decisions "necessarily included" the requisite finding covered by the omitted instruction, see *United States* v. *Sun-Diamond Growers*, 119 S. Ct. 1402, 1411 (1999) (rejecting such a claim), or if the material facts as to the omitted element were wholly uncontested, as in *Neder* v. *United States*, 119 S. Ct. 1827, 1837 (1999), a fundamentally flawed instruction on a ***disputed*** element (see Pet. 26 n.12) cannot qualify as "harmless error." In such circumstances, the reviewing court may not "perform the jury's function of evaluating the evidence of [a material element], when the jury never may have performed that function." *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983). "Such an error" deprives parties "of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Ibid.* (quoting *Chapman* v. *California*, 386 U.S. 18, 23 (1967)). The Ninth Circuit's "view [of] the evidence" — much

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[4] Likewise, accepting that John Dresel's altered (but restored) Daytimer calendar placing Barry Ackerley's name above Laura Lambert's (see App., *infra*, 9a) on the first business day after receipt of the letter from Lambert's lawyers could show Barry Ackerley's knowledge of Lambert's grievance, it certainly did nothing to "link[]" Barry Ackerley to any "Laura Lambert strategy." Opp. 21. And the fact that the name "Barry" appeared "between 25 and 30 times" in Dresel's 1994 Daytimer (RT 781) — before, during, and after Lambert's complaint — shows little more than Barry Ackerley's general involvement in the operations of the subsidiary that employed Dresel — far too flimsy a basis for implication in any retaliation.

less respondents' self-serving assessment (see Opp. 24 n.4) — "is * * * simply irrelevant." *Ibid.*

In addition, and characteristically, respondents cite ***no*** evidence to support their assertion that "each of the respondents communicated with the petitioners about overtime." Opp. 24 n.4. (The evidence contradicting this assertion is collected at Pet. 26 n.12.) Certainly no other respondent chose to join Lambert's contemplated lawsuit, so that her ***written*** complaints — on which respondents rely so heavily in trying to evade review of the first question (see Opp. 10-12) — explicitly were made on her behalf alone. See Pet. 26 n.12. Indeed, the evidence on this issue was so one-sided in favor of ***petitioners*** that, rather than attempt to prove that any of the five respondents other than Laura Lambert complained in ***any*** way, respondents fought for and obtained an instruction that required the jury to find only that ***Laura Lambert's complaint*** caused the others' discharge. Thus, the jury was explicitly told, at respondents' behest, that it did ***not*** have to find "that each plaintiff engaged in protected activity" so long as "one plaintiff engaged in protected activity." ER 360. See Pet. 25-26.

Even if their evidence on the point were far stronger, respondents cannot have it both ways. Having kept the representation issue from the jury, they cannot rest on the availability of evidence to support a finding they resisted having to establish and never obtained. The Ninth Circuit's eagerness to play fact-finder "so far depart[s] from the accepted and usual course of judicial proceedings" (Sup. Ct. R. 10(a)) that it warrants correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1999

APPENDIX

APPENDIX

[from SER 187; RT 68]

Q What happened next?

A The next thing I did, two days following that meeting with Eddie, is I decided if it was a principle issue for me I needed to make sure that what I was talking about was correct. And I looked in the phone book, and I didn't really know what I was looking for, but anybody that could help me about overtime compensation and how it was supposed to be paid. And I had called the U.S. Department of Labor.

Q When was that?

A That was on the 18th. And I had left a message. And they said that the gentleman who would be calling me back wouldn't be able to call me until the next day, which was the 19th.

Q The 19th of May?

A Of May, yes. And his name was Officer Williams and he would be contacting me sometime in the morning.

Q And did you speak with Officer Williams on the 19th?

A Yes.

Q After talking with Officer Williams, did you come to any conclusions about the Sonics overtime payment scheme?

A Yes, I did.

[SER 188; RT 69]

Q And what was that conclusion?

A He had walked through the overtime compensaton structure, and I briefly explained to him what our current structure was. And he had pointed out those things which were against the law and in violation.

And following that I went back to Eddie Roldan. I was kind of excited, thinking, you know, now they'll do the right thing and maybe they just didn't know that they were doing it wrong. So I went back to Eddie and explained it to him.

* * *

[omitted material recounts conversations with Sonics employees Roldan and Boustead]

[from SER 190; RT 71]

Q What was the next thing you did after Mr. Boustead told you this?

A I went back to my desk and I called the U.S. Department of Labor again and asked to speak with Officer Williams.

Q And what did you ask him?

A I had asked — I told him that they had said that they would get the checks cut, they had a meeting, that it was a dead issue and nothing was going to be resolved. And I asked him if he could send me the documentation in the mail showing that that's how they were supposed to pay it.

Q Why did you ask him to send you documentation in the mail?

A Because nothing else seemed to work so far.

Q Did you plan to show that to Sonics management?

[SER 191; RT 72]

A I had planned to actually first make sure again that what I was saying was correct, because I didn't want to make waves. I loved my job. I didn't want to cause any trouble. And that's what I did. I asked for the documentation so I could read over it.

Q May 19th, anything else happen that day?

A No, not that day.

Q May 20th, you had the documentation in hand.

A He had mailed the documentation the day before, said I should have it the following day, and he had mailed it to the Sonics office. I got that in the morning and I read over it.

Q Then what did you do?

A Actually I was surprised when I opened it, because he had marked everything that was pertinent to our office and our structure as salespeople, which helped me out a lot because I wouldn't have known where to begin.

So I read the items that he had marked and I read the items that he had highlighted. And then after I was 100 percent sure that what I saying was correct I went back again to the accounting department and talked to Eddie.

[from SER 311; RT 780]

Q Now, let me — I put this a little too far toward the top. The heading on your notes is personnel issues, correct?

A That's correct.

Q And one of the things you indicate in your notes is Barry Ackerley was being told about the overtime problems; isn't that true?

A What that refers to, again, I called our corporate counsel on the Tuesday and said to him, we have an issue here with a person who works for us about overtime, what do I do? And he said he'd take care of it. And I perhaps assumed that our corporate counsel was going to tell Barry if he felt the need to. I to this day have no idea what he told Barry.

Q Your corporate counsel is a gentleman named Erick Rubin, correct?

A That's correct.

Q And he is based in New York City?

A No, he's not. He's based in Washington, D.C.

Q Where is he?

[SER 312; RT 781]

A. Washington, D.C.

Q Washington, D.C. In any event, he is here in this courtroom, is he not, sitting right back here?

A He is indeed.

Q And so you are saying that you talked to Mr. Rubin and told him that there is an employee raising an overtime claim; is that correct?

A That's correct.

Q And so instead of writing Eric being told or general counsel being told, you decided to write Barry being told in your notes?

A Yeah. Again, I've never talked to Barry about this. I told Mr. Rubin, there's a claim. He said, he'd take care of it, and whether he has or not taken care of it or whether he told Barry or not, I don't know.

Q Would you disagree with me, Mr. Dresel, if I told you that the name Barry Ackerley or Barry appears in your Daytimer for 1994 somewhere between 25 and 30 times?

A I'd have to count it up in order to disagree with you, but it — it appears in there quite a few times, that's right.

Q It does?

A Um-hum.

Q And you talked to Mr. Ackerley about ticket prices, didn't you?

A At times, yeah.

[SER 313; RT 782]

Q You talked to Mr. Ackerley about the Fabulous Sports Babe, didn't you?

A Only because she was verbally abusing us on the air, yes.

Q But at no time has this problem been the kind of problem you felt like you should talk to Mr. Ackerley about?

A This is not the type of problem that I would discuss with the chairman of our company, no. Now, the Sports Babe is this woman who has been on our radio station for a long time, and at one point she got an offer from ESPN Radio to go to work for them, and she really wanted to go, and unfortunately she was under contract with us.

So in order for her to get out of her contract, she began saying very awful things about myself and Ackerley Communications, and I felt the need to tell the chairman that what he was listening to was in reference to her trying to get out of her contract.

It was a very fun time in our lives.

[ER 113; Plaintiff Exhibit No. 2]

MEMORANDUM

October 12, 1994

TO: Bill Ackerley

FROM: John Dresel

RE: Layoffs

cc: Debbie Stednick

Last November the ticketing staff's hours were reduced because ticket inventory for the remaining games was so small, we were convinced the games would sell out via tickets sold through TicketMaster. As with last year, we believe this will happen and again this year resulting in insufficient work to keep these employees busy. Considering this I have reached the conclusion that these positions are more seasonal in nature. I am therefore planning to layoff the entire ticketing sales staff by November 30. Any residual requirements for sales will be the responsibility of the manager of this department. The current staff will be compensated for any individual and group sales made during their tenure.

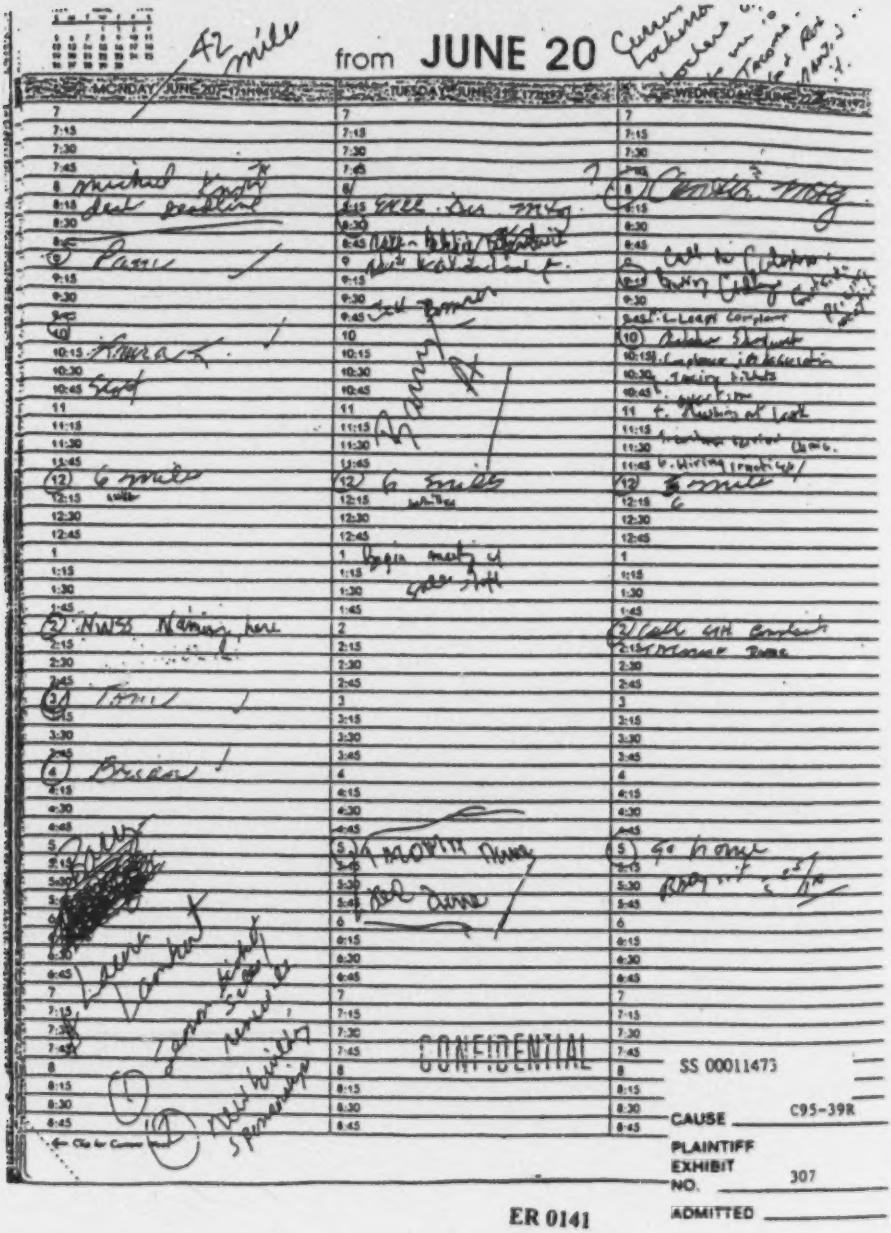
[ER 121; Plaintiff Exhibit No. 55 (original is handwritten)]

Personnel Issues

1. Job descriptions — going out
2. Reviews — o.k. & ready
3. tickets to employees
4. overtime — over
   - are Salary & Bonus employees exempt?
   - Barry being told
5. Interview seminar
6. Customer Service Seminar

   Laura Kussick show Debbie Stednick Customer Service info

[ER 141; Plaintiff Exhibit No. 307 (reduced)]



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